IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 00-10167

UNITED STATES OF AMERICA,

Appellee,

v.

TUCOR INTERNATIONAL, INC., ET AL.

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Rules:

Legislative Materials:

Other Materials:

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JURISDICTION

Defendants were indicted for violating section 1 of the Sherman Act, 15 U.S.C. 1. The district court had jurisdiction under 18 U.S.C. 3231. After the indictment was dismissed, defendants filed a motion for attorneys' fees pursuant to the Hyde Amendment (18 U.S.C. 3006A note). On March 16, 2000, the district court entered an order denying the motion. Defendants filed a timely notice of

appeal under F.R.A.P. 4(b) on March 27, 2000. This Court has jurisdiction under 28 U.S.C. 1291.

BAIL STATUS

No defendant is in custody or on bail.

ISSUE PRESENTED

Whether the district court abused its discretion in denying attorneys' fees in this criminal case.

STATUTE INVOLVED

The Hyde Amendment, Pub.L. 105-119, Title VI, § 617, 111 Stat. 2519 (1997), set out as a note to 18 U.S.C. 3006A, provides in relevant part:

> [T]he court, in any criminal case * * * may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust.

STATEMENT OF THE CASE

A grand jury indicted defendants for price fixing in violation of the Sherman Act, 15 U.S.C. 1, on September 9, 1992. One of the defendants, Tucor Industries, Inc. ("Tucor"), pleaded guilty in June 1993, and the indictment was dismissed as to

two related defendants as part of the plea agreement.[1] The government was unable to secure personal jurisdiction over the remaining eight defendants, four Philippine individuals and four corporations, who were never tried.

On August 15, 1997, Tucor and four other defendants[2] asked the district court to dismiss the indictment (Tucor E.R. 43-44).[3] Their primary argument was that the agreement for which they were indicted was immunized from the antitrust laws by the Shipping Act of 1984, 46 U.S.C. app. 1701 et seq. The district court (Jensen, J.) granted the motion to dismiss on June 15, 1998. *United States v. Tucor International, Inc.*, 35 F.Supp.2d 1172 ("*Tucor I*"). This Court affirmed that decision on September 2, 1999. 189 F.3d 834 ("*Tucor II*").

On December 30, 1999, Tucor and the Luzon defendants filed a motion for attorneys' fees under the Hyde Amendment (18 U.S.C. 3006A note). The district

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[1] There were originally 12 defendants, of whom 9 remain. Pursuant to the plea agreement with Tucor Industries, Inc., a Philippine corporation, the indictment was dismissed as to Tucor International, its U.S. parent, and Dale Bailey, one of its officers. The indictment was also dismissed as to Patrick Boll, another of its officers, who had died in the meantime.

[2] The four other defendants (collectively "Luzon defendants") are Luzon Moving & Storage Corp. and Philippine-American Moving & Storage Corp., and their owners/officers, George Schulze, Sr. and George Schulze, Jr.

[3] "Tucor E.R." refers to the Joint Excerpts of Record of Appellants. "U.S. E.R." will be used to refer the Excerpts of Record for the United States.

court denied the motion in an order dated March 14 (entered March 16), 2000 (Tucor E.R. 99). That is the decision on appeal.

STATEMENT OF FACTS

1. When the Department of Defense ("DoD") transfers personnel between bases, it contracts with private freight forwarders in the United States to make the transportation arrangements for their household goods. The freight forwarders, whose rates are set by competitive bidding, ordinarily do not perform the physical movements themselves. Instead, they subcontract the work to other carriers, who must be approved by DoD.

Defendants are motor carriers in the Philippines employed by U.S. freight forwarders to move the household goods of military personnel between ports and the former U.S. military bases in the Philippines (Clark Air Force Base and Subic Bay Naval Station), and to pack and unpack the goods at the homes of the personnel. As alleged in the indictment, they began a conspiracy to fix the rates they charged the freight forwarders in October 1990, and the increased costs were passed on to the United States government.

In 1992, a grand jury indicted defendants for price fixing in violation of section 1 of the Sherman Act, 15 U.S.C. 1. Defendants have never denied the facts alleged in the indictment. The government, however, could not secure personal

jurisdiction over most of the defendants because the firms were owned and operated by Philippine citizens. Tucor, which had an American parent company and American officers, pleaded guilty and paid a fine in 1993, in return for the dismissal of the indictment against the parent firm and its officers.

So matters stood until 1997, when defendants challenged the indictment. They argued that as a matter of law the offense alleged in the indictment was immunized from the antitrust laws by section 7(a)(4) of the Shipping Act of 1984, 46 U.S.C. app. 1706(a)(4), which exempts "any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade." The district court granted their motion to dismiss, noting, however, that:

> The government's supplemental briefing contains a defensible, although, in the Court's opinion, incorrect interpretation of the scope of the Shipping Act immunities. Under these circumstances, the Court finds that the government has rebutted Tucor's contention that the government considered Tucor's conduct immunized when it entered into the plea agreement.

Tucor I, 35 F.Supp.2d at 1188.

This Court affirmed the district court's decision on the ground that section 7(a)(4) "unambiguously exempts the activities of the Tucor and Luzon defendants from antitrust liability." *Tucor II*, 189 F.3d at 836. The Court rejected the

government's contrary interpretation of the statute as "base[d] * * * on its interpretation of section 4(a)," 46 U.S.C. app. 1703(a), *Tucor II* at 837, and reasoned that that interpretation was inconsistent with the language of section 7(a)(2), and with section 7(a)(3) as previously construed by this Court in *Transpacific Westbound Rate Agreement v. FMC*, 951 F.2d 950 (9th Cir. 1991) ("*Transpacific*"). It also thought that the several congressional committee reports that characterized section 4 as defining the breadth of the antitrust exemption in section 7 did not clearly require the more limited reading.

2. Defendants moved in the district court for attorneys' fees under the Hyde Amendment, 18 U.S.C. 3006A note, alleging that the government's prosecution of them was "vexatious, frivolous, and in bad faith." After full briefing, the court denied the motion.

The district court adopted the definitions of the statutory terms "vexatious, frivolous, and in bad faith" established in *United States v. Gilbert*, 198 F.3d 1293 (11th Cir. 1999) (Tucor E.R. 105-06). It rejected Tucor's claim that the government should be deemed automatically to be acting vexatiously or in bad faith simply because it was not persuaded by a defense presented during the prosecution that was later upheld by the court (*id.* at 112). The court reiterated its earlier finding "that the government honestly believed at the plea hearing that the conduct in the

indictment was prohibited by law and did not fall within the immunity clauses of the Shipping Act" (*id.* at 112), and added that: "The Court is satisfied that the legal position taken by the government in this case was not foreclosed by binding precedent and that it was not so obviously wrong as to be frivolous" (*id.* at 112-13). Focusing specifically on *Transpacific*, it held the decision "is factually inapposite and constitutes dicta as to *Tucor*" and that the government's legal positions in the two cases are at least arguably "not in contradiction," so that "defendants have not established that the government's failure to disclose was made with a malicious intent" (*id.* at 118). Finally, the court found that, "although possibly incorrect again on the application of the law," the government believed that some of the transportation underlying the indictment was not through transportation subject to exemption under section 7(a)(4) (*id.* at 120).

The district court summarized its findings as follows (Tucor E.R. 120-21):

> [D]efendants have not met their burden of showing that the government's position was frivolous, vexatious, or in bad faith. The Court has previously found that the government's interpretation of Section 7 was defensible. As to bad faith, the Court chastized the government's silence at the plea hearing on a possible interpretation of the immunity clause. However, this appears to be poor judgment rather than bad faith. Finally, any inconsistencies in the government's legal position in *Transpacific* and in this case do not appear to amount to a circumstance where penalties under the Hyde Amendment are warranted. The section of the Shipping Act at issue, Section 7(a)(4), under the factual scenario of whether it applied to a land based carrier

> had not been addressed by any court. The Court agrees with *Gilbert* that the government should not be held liable for its legal position unless there is binding precedent to the contrary or it is obviously wrong. Neither criteria has been established in this case and the Court finds that the Hyde Amendment has not been violated.

The defendants have appealed that decision.

SUMMARY OF ARGUMENT

1. The district court correctly held that the definitions of the statutory terms "vexatious, frivolous, or in bad faith" are those set forth in *United States v. Gilbert*, 198 F.3d at 1298-99. Under those standards, a defendant seeking to recover attorneys' fees must show "a lot more" than that he prevailed; rather, he must show "that the government's position underlying the prosecution amounts to prosecutorial misconduct–a prosecution brought vexatiously, in bad faith, or so utterly without foundation in law or fact as to be frivolous." *Id.* at 1299.

2. Defendants' claim that the district court misapplied the statutory standard grossly mischaracterizes the district court's decision. In the district court, defendants made pervasive allegations that the government had acted in bad faith, arguing that the government had been pursuing a case that it knew was meritless. Nevertheless, contrary to their representation that the district court improperly attached an overarching "subjective intent requirement" (Tucor Br. 14-15), the district court carefully considered in the alternative whether the government's

position was in bad faith or objectively frivolous, and found that it was neither. It also considered in the alternative whether the government's position was either foreclosed by precedent or otherwise obviously wrong, and found that it was neither. Those findings, informed by the district court's own prior consideration of this case on the merits and its assessment of the government's credibility, are plainly correct.

3. As the district court found, the fact that this Court rejected the government's interpretation of the Shipping Act in *Tucor II*, does not establish that the government's prosecution "was vexatious, frivolous, or in bad faith." At the time it filed this case, the government reasonably believed that the immunity granted by sections 7(a)(3) and (4) of the Shipping Act are counterparts of the filing exception in section 5(a) for agreements relating to transportation within and between foreign countries, and, like the filing exception, apply only to ocean common carrier agreements. It also reasonably believed that its position was consistent with this Court's decision in *Transpacific*, which addressed the application of sections 4, 5, and 7 to ocean common carriers, particularly when that decision is read in light of the underlying FMC decision that it affirmed. This Court did not find any contradiction between the government's position in this case and

the theory it espoused in the *Transpacific* proceedings, and the two are entirely consistent.

Finally, defendants' novel argument–that section 7(a)(4) would not immunize ocean common carrier agreements regarding the foreign inland leg of through transportation–is flatly contrary to the language of the Shipping Act.

4. The government also had reason to believe that the indictment covered conduct that would not be immune even under this Court's construction of the Shipping Act. The government's evidence indicated that defendants' conspiracy covered a substantial number of government shipments that were not carried on through rates under the Shipping Act, despite the fact that they moved under through government bills of lading. Based on the only precedent that existed at the time this case was filed, the government believed that whether a movement under a through government bill of lading was "through transportation" was an issue of fact to be settled by evidence at trial, not on the face of the indictment.

ARGUMENT

The district court's decision denying attorneys' fees is subject to review for abuse of discretion, including *de novo* review of the legal standards applied. *Gilbert*, 198 F.3d at 1297-98. Accord, *United States v. Bunn*, 2000 WL 770140, *4 (4th Cir. 2000); *United States v. Truesdale*, 211 F.3d 898, 905 (5th Cir. 2000). Cf.

Stephen W. Boney, Inc. v. Boney Services, Inc., 127 F.3d 821, 825 (9th Cir. 1997) (Lanham Act case, noting consistent abuse of discretion standard under statutes allowing attorneys' fees).

I. THE HYDE AMENDMENT REQUIRES A SHOWING OF PROSECUTORIAL MISCONDUCT

The Hyde Amendment allows an award of attorneys' fees to a successful defendant in a criminal case only if the position of the government "was vexatious, frivolous, or in bad faith." The court in *Gilbert* defined those terms, in accord with their "ordinary meaning," as follows:

> "Vexatious" means "without reasonable or probable cause or excuse." Black's Law Dictionary 1559 (7th ed. 1999); *see also Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978) (describing "vexatious" conduct in the Title VII context as being "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"). A "frivolous action" is one that is "[g]roundless ... with little prospect of success; often brought to embarrass or annoy the defendant." Black's Law Dictionary 668 (6th ed. 1990); *see also* Fed.R.Civ.P. 11. Finally, "bad faith" "is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; ... it contemplates a state of mind affirmatively operating with furtive design or ill will." Black's Law Dictionary 139 (6th ed. 1990); *see also Franks v. Delaware*, 438 U.S. 154, 171, 98 S.Ct. 2674, 2684, 57 L.Ed.2d 667 (1978) (defining bad faith in the law enforcement context to include "reckless disregard for the truth").
>
> From the plain meaning of the language Congress used, it is obvious that a lot more is required under the Hyde Amendment than a showing that the defendant prevailed at the pre-trial, trial, or appellate

> stages of the prosecution. A defendant must show that the government's position underlying the prosecution amounts to prosecutorial misconduct–a prosecution brought vexatiously, in bad faith, or so utterly without foundation in law or fact as to be frivolous.

198 F.3d at 1298-99. Accord, *Bunn*, 2000 WL 770140, *4. See also *Truesdale*, 211 F.3d at 908-09 (defendant must prove more than that government position was not substantially justified). The district court adopted the *Gilbert* definitions (Tucor E.R. 105-07), and defendants do not question them (Tucor Br. 13-14).[4] The government agrees that they are appropriate definitions for purposes of this case.[5]

II. THE DISTRICT COURT MADE THE PROPER FINDINGS

The Hyde Amendment requires a finding that the government acted "vexatiously, frivolously, or in bad faith" in the alternative. Defendants claim that the district court applied the law as if it required those elements to be found in the conjunctive (Tucor Br. 13-15). This argument, based on a tortured reading of the district court's decision, is wholly without foundation.

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[4] "Tucor Br." refers to the Joint Brief of Appellants on this appeal.

[5] According to Webster's Third New International Dictionary (1981), "vexatious" means "lacking justification and intended to harass," thus including an intent element not present in the Black's definition. Since the government's position here was justified, however, it is unnecessary to reach the question whether the Hyde Amendment requires such an element.

The district court clearly understood the statute. At the outset of its substantive discussion, it correctly stated the nature of the inquiry: "[w]hether the position of the United States was vexatious, frivolous, or in bad faith" (Tucor E.R. 108). It then conducted a detailed examination of all the government conduct as to which defendants had raised Hyde Amendment claims (*id.* at 108-20). And it concluded–again speaking in the alternative language of the statute: "[i]n sum, defendants have not met their burden of showing the government's position was frivolous, vexatious or in bad faith" (*id.* at 120). Given these clearly stated and correct guideposts in the district court's careful opinion, defendants' claim that the district court in between suffered some kind of amnesia is frivolous.

In any event, the distinction between the "vexatious or frivolous" standard and the bad faith standard is not one defendants made in the district court. As shown by the table of contents in their opening Memorandum, they alleged across the board that: "The Justice Department's Prosecution of Defendants Was Vexatious, Frivolous, and in Bad Faith;" the subheadings accuse the Department of a lack of candor in not telling the court about the Shipping Act defense or the government's allegedly inconsistent argument in *Transpacific*.[6] In their Reply they

[6] Docket 132, Defendants Memorandum of Points & Authorities in Support of Jt. Motion for Attorneys' Fees and Costs, at I (filed Dec. 30, 1999) ("Trial Mem. (continued...)

insisted that "[t]he Justice Department's *post hoc* interpretation of the Shipping Act in this case * * * was both frivolous and in bad faith in light of its prior interpretation of section 7(a)(3)."[7] Their argument below, as here (Tucor Br. 6-9, 18-19), was that the government not only brought a case that was objectively lacking in substance, but that it deliberately pursued the case after defendants' counsel (Mr. Dean) brought the "clear and unambiguous" language of the Shipping Act to the attention of the government's attorney (Mr. Tom) while the latter was heading an investigation of suspected rate fixing by Greek motor carriers serving DoD's Hellenikon Air Force Base.[8] Similarly, they accuse the government of failing to disclose the allegedly contradictory position it took in *Transpacific* "even though the same Justice Department attorney, Robert J. Wiggers, appeared in both cases."[9]

In short, defendants' allegation of bad faith was pervasive. The government, in their view, was not just pursuing an unfounded case, but doing so knowingly,

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[6] (...continued)
in Support").

[7] Docket 146, Jt. Reply Memorandum of Defendants in Support of Jt. Motion for Attorneys' Fees, at 5 (filed Feb. 15, 2000).

[8] Trial Mem. in Support 12. Accord, Tucor Br. 18.

[9] *Id.* at 16.

after its lack of merit was forcefully brought to the government's attention. And they drew the inference of bad faith, not from any evidence of ulterior motive, but entirely from their perception of the lack of merit of the government's arguments, and the fact that the government did not seek an indictment in a similar Greek case after Mr. Dean explained his theory to Mr. Tom (Tucor Br. 18).

Despite defendants' failure to distinguish the applicable standards, the district court made the appropriate findings. First, it reaffirmed its finding that the government "honestly believed at the plea hearing that the conduct in the Indictment was prohibited by law and did not fall within the immunity clause of the Shipping Act" (Tucor E.R. 112). It based that finding on a sworn declaration by Mr. Tom which explained that the government did not agree with defense counsel's (Mr. Dean) legal theory, and that the theory played no role in the government's decision to close the Greek investigation. *Tucor I*, 35 F.Supp.2d at 1187-88 (citing U.S. E.R. 2-3). That was a credibility determination well within the district court's power to make. Defendants, while asking this Court to infer that the government's "decision to take no action against the Greek companies * * * speaks volumes about what it really thought of its case" (Tucor Br. 18), nowhere mention the declaration or even acknowledge the district court's finding. That is a striking omission, since the district court's finding of fact is conclusive unless clearly erroneous, and the

court had ample opportunity to assess Mr. Tom's credibility in his appearances before the court. F.R. Civ. P. 52(a).

Also contrary to defendants' representations (Tucor Br. 14), the district court separately assessed the objective reasonableness of the government's arguments, and was "satisfied that the legal position taken by the government in this case was not foreclosed by binding precedent and that it was not so obviously wrong as to be frivolous" (Tucor E.R. 112-13) (footnote omitted). Having wrestled with the issue on the merits itself, the court was well qualified to make that determination. See *Tucor I*, 35 F.Supp.2d 1177-83. The court also found that the government's positions in *Transpacific* and in this case are at least arguably consistent (Tucor E.R. 118). Thus, the district court made precisely the findings of objective reasonableness that defendants demand (Br. 15), and for the reasons set forth below, those findings are clearly correct.

Defendants' further objections to the district court's decision are equally meritless. Contrary to defendants' argument that the district court held the Hyde Amendment applicable "only where binding, judge made law forecloses the prosecution" (Br. 12, 15-17), the court recited and applied the alternative tests (foreclosed by precedent *or* obviously wrong) (Tucor E.R. 117). It noted that in deciding the merits it had itself reviewed the language and legislative history of the

Shipping Act and found the government's position "defensible," *i.e.*, not obviously wrong (*ibid.*). With respect to *Transpacific*, it found that defendants had not originally relied on the case (the government brought the decision to the court's attention), and that it was distinguishable from this case, not foreclosing precedent (Tucor E.R. 117-18). In its summary, the court repeated the alternative tests, and explicitly concluded that "neither criteria has been established" (Tucor E.R. 121). Defendants' argument that the court relied only on precedent simply misrepresents the court's decision.

Defendants contend that the government violated its ethical duties in failing to inform the court of a known jurisdictional defect (Tucor Br. 18-21). If the government had believed that the defendants were covered by the Shipping Act immunity (a condition which the district court, as noted above, has found not true), its duty would have been to move to dismiss the indictment, not merely to bring the legal issue to the attention of the court. On the other extreme, the government obviously has no duty to waste the court's time with arguments that are plainly frivolous. In between are a broad spectrum of issues that require judgment. The government's judgment was that Congress did not intend to extend immunity to independent conspiracies among foreign inland carriers, and was aware of no material circumstances that required bringing the Shipping Act argument to the

court's attention. While the district court initially criticized the prosecutor's decision, *Tucor I*, 35 F.Supp.2d at 1188, it clarified its views in response to the defendants' Hyde Amendment motion, saying (Tucor E.R. 112-13):

> While the Court did find that counsel for the government had interpreted his "prosecutorial obligations" too narrowly, the Court made this observation as an assessment of faulty judgment by the government not that its conduct was intended to defraud the Court. * * * In as much as the Court finds that the legal position taken by the government was a defensible one in a first impression circumstance, this situation does not appear to be one in which the Hyde Amendment applies.

The district court's decision on this point is entirely consistent with the Hyde Amendment as construed in *Gilbert.* As the Eleventh Circuit held in that case, the statute is intended to punish "prosecutorial misconduct, not prosecutorial mistake." 198 F.3d at 1304. A simple misjudgment by a prosecutor regarding the merits of a defense – even an ultimately successful defense brought to the prosecutor's attention before an indictment, as was the situation in *Gilbert*, at 1303 – is not the equivalent of misconduct. "To be eligible for fees as a result of having prevailed on a legal defense, the defendant must show that the government's legal position was either asserted in bad faith or without any foundation or basis for belief that it might prevail." *Ibid.* Mere misjudgment by the government with respect to a defense that it honestly and reasonably considered to be without merit does not rise to the level

of such prosecutorial misconduct.[10] Indeed, since the defense is simply a question of statutory interpretation, nothing prevented defense counsel who represented Tucor at the time of its guilty plea from raising this defense if counsel had thought that the defense had any merit.[11]

Finally, defendants contend that the district court's decision "trivialized" a putative inconsistency between the government's positions here and in *Transpacific* by holding that defendants must show that the government concealed the inconsistency with "malicious intent," not merely that the attempt to distinguish its positions was frivolous (Tucor Br. 21-22). In doing so, defendants themselves fail to disclose the district court's finding that "it is at least arguable that the government's two positions are not in contradiction," *i.e.*, that its distinctions between the two are not frivolous (Tucor E.R. 118). Only then did the court

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[10] The ABA Model Rules of Professional Conduct (see Rule 3.3(a)(3)) and the State of California Rules of Professional Conduct (see Rules 5-110 and 5-200(B)) require an attorney to disclose authority that he knows to be adverse. In this case, as the district court found, the government's attorney, after looking into this issue of first impression, thought the Shipping Act immunity inapplicable. Under those circumstances, there is no precedent for finding an ethical violation in the failure to disclose.

[11] Defendants grudgingly concede that *Brady v. State of Maryland*, 373 U.S. 83 (1963), applies only to failures to disclose exculpatory evidence (Tucor Br. 20). *Brady* certainly does not require government counsel to disclose purely legal arguments that government counsel do not believe are correct and that, in any event, defense counsel can craft for themselves.

proceed to reject defendants' accusation of bad faith, which was based entirely on the supposed frivolousness of the government's argument (*ibid.*). In short, the district court never held that bad faith was the only basis for recovery under the Hyde Amendment. Its finding that the government's distinction between its positions "is at least arguable" is correct, for reasons to be explained below.[12]

[12] Even if the government's position were not as strong as it is, special circumstances would make an award of attorneys' fees unjust within the meaning of the Hyde Amendment. The Luzon defendants' litigation has been essentially voluntary. They have never been subject to the jurisdiction of the court. They filed their motion to dismiss pursuant to a special appearance (Tucor E.R. 44-45). There was no likelihood that the Philippine government would extradite them. Nor was there any financial imperative. There has been little U.S. government moving business to be done in the Philippines since the closure of the military bases (Clark Air Force Base when Mt. Pinatubo erupted in June 1991, and Subic Bay Naval Base when its lease terminated in 1992). Even if that were still a consideration when they filed their motion in 1997, DoD's cessation of business with the defendants, whether their cartel was legal or not, was simply good business sense. See *Household Goods Carriers Bureau v. U. S. Department of Defense*, 783 F.2d 1101, 1103 (D.C. Cir. 1986) (DoD could reject rate bureau bids that were lawful under Interstate Commerce Act; the Armed Services Procurement Act "stresses individual competition"). Finally, no penalties were ever imposed on the individual Tucor defendants as a result of its plea bargain, and the attorneys' fees relating to the company's writ of coram nobis are several times greater than its fine (Tucor Br. 26). In short, this is not a situation that warranted incurring legal fees of over one million dollars (Tucor Br. 10), and U.S. taxpayers should not have to compensate such disproportionate expenditures.

III. THE GOVERNMENT'S POSITION WAS NEITHER FRIVOLOUS NOR INCONSISTENT WITH ITS POSITION IN *TRANSPACIFIC*

In *Tucor II*, this Court stated that the language of the Shipping Act is "clear and unambiguous," 189 F.3d at 835, and that the government's argument "makes little sense," *id.* at 837. Relying on this language, defendants argue that the government's position had no support (Tucor Br. 16-17), *i.e.*, it was "so obviously wrong as to be frivolous" under *Gilbert*. See 198 F.3d at 1304. The district court properly rejected that contention; a holding that a statute is "clear" does not necessarily mean that a contrary construction is "frivolous" for purposes of the Hyde Amendment. That is particularly so when a statute like the Shipping Act reflects the complexity of the industry it is designed to regulate. Indeed, defendants' allegations of bad faith and vexatiousness also fly in the face of the fact that the General Counsel of the Federal Maritime Commission, the independent agency charged with enforcing the Shipping Act, agreed with the government's interpretation of the Shipping Act during the criminal case (see U.S. E.R. 15-17).

In any event, the clarity of a statute is often in the eye of the beholder. For example, in *Stenberg v. Carhart*, 120 S.Ct. 2597 (2000), five Justices thought that even if a Nebraska statute's purpose was to ban partial birth abortions (dilation and extraction, or "D&X"), "its language makes clear that it also covers a much broader

category of procedures." *Id.* at 2614. Four Justices thought the opposite. *Id.* at 2640 (Thomas, J., dissenting); *id.* at 2631-32 (Kennedy, J., dissenting). Similarly, in *United States v. Aguilar*, 21 F.3d 1475 (9th Cir. 1993) (en banc), nine members of this Court held that "[t]he plain language of the statute is clear," and barred conviction for the disclosure of a wiretap authorization that had expired. *Id.* at 1480. But see *id.* at 1488 (dissenting opinion) (statute clearly allowed conviction). The Supreme Court reversed this Court's decision, and reinstated the wiretap conviction, holding that this Court's reasoning "fails in the face of the statutory language itself." *United States v. Aguilar*, 515 U.S. 593, 603 (1995). In short, "[t]he notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J, dissenting). Thus, a court's holding that a statute is clear does not necessarily mean that its construction is beyond legitimate debate.

A. The Government's Interpretation of the Shipping Act Was Not Unfounded

While this Court has already decided in *Tucor II* how it interprets the Shipping Act with respect to the underlying facts of this case, some discussion of the statutory scheme is necessary to understand why the district court correctly

concluded that the government's prosecution was not "vexatious, frivolous, or in bad faith."

The antitrust immunities for agreements relating to transportation services within and between foreign countries are set forth in sections 7(a)(3)-(5) of the Shipping Act, 46 U.S.C. app. 1706(a)(3)-(5). They were enacted by Congress at the request of ocean common carriers to immunize from the antitrust laws those carriers' own agreements regarding transportation services within and between foreign countries. A witness for Sea-Land Services, a U.S.-flag carrier, thus explained that he "strongly supported" a bill granting immunity for any agreement "that applies *solely* to transportation services between foreign countries" (emphasis added), and gave concrete examples of the types of transportation that he was concerned with, such as "the relay or transshipment of foreign-to-foreign cargoes at U.S. ports," and "the movement of foreign-to-foreign cargoes across the U.S. in a landbridge operation."[13] Shipping Act of 1981: Hearings before the Subcommittee

[13] The Sea-Land testimony also includes a reference to "U.S. Government impelled cargoes" between foreign countries that targets an earlier decision, *Pacific Seafarers, Inc. v. Pacific Far East Line*, 404 F.2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969). The court had found antitrust coverage of a predatory conspiracy among a group of U.S.-flag carriers to drive another U.S.-flag carrier out of the business of transporting U.S. funded cargo between Taiwan and South Vietnam. *Id.* at 814. The defendants were also common carriers serving U.S. ports. *Id.* at 808. The House Judiciary Committee balked at immunizing *Seafarers*-

(continued...)

on Merchant Marine of the Senate Committee on Commerce, Science, and Transportation, 97 Cong. 185 (1981) (statement of Peter Finnerty). A representative of a foreign shipowners group then testified that he was concerned by the word "solely" in the bill, which could be construed to exclude "arrangements by conferences or ocean carriers" for inland transportation in connection with their intermodal services. *Id.* at 208 (statement of Dr. John-Henry de la Trobe); see also *id.* at 197 ("all we are seeking here is the right for conferences to set the through rates which members will charge shippers who want to use conference through-intermodal service"). The provisions relating to transportation within foreign countries and foreign inland segments were then added. The committee reports confirm that Congress was simply trying to accommodate the carriers' requests. One, for example, echoes the Sea-Land testimony in explaining that the exemption for transportation between foreign countries was to insure that "landbridge and all-water services between foreign countries that transit or touch the United States * * * not lose their an[t]itrust exemption due to that contact," and in particular that "U.S.-

[13] (...continued)
type conduct, and added the proviso to section 7(a)(3) that retains antitrust jurisdiction over agreements that have a substantial effect on U.S. commerce. H.R. Rep. No. 98-53, pt. 2, at 32-33 (1983).

flag carriers ought not to be inhibited from participating in such trades." H.R. Rep. No. 97-611, pt. 1, at 37 (1982).

Against that background, the government thought that Congress intended an immunity only for agreements of ocean common carriers. It also reasonably believed that Congress's language expressed that limitation. Specifically, interpreting the language of the Shipping Act in context (*e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291, 1300-01 (2000)), section 4 says the Act applies to agreements by or among ocean common carriers and marine terminal operators. Sections 5 and 7 then establish a two-track system relating to filing and immunity.[14] Section 5(a), 46 U.S.C. app. 1704(a), requires most agreements "with respect to an activity described in section 4" to be filed, and filed agreements are immunized by sections 7(a)(1) and (2). Section 5(a), however, also excepts certain types of agreements from the filing requirements, including agreements relating to transportation within or between foreign countries. Section 7(a)(3) exempts precisely the same "within or between foreign countries" agreements from the

[14] "[Section 4] states the coverage of the bill. It lists the type of agreements to which the bill applies. When read in connection with sections 5 and 7, the effect is to remove the listed agreements from the reach of the antitrust laws as defined in the bill." H.R. Conf. Rep. No. 98-600, at 28 (1984). Accord, H.R. Rep. No. 98-53, pt. 1, at 29 (1983) (House Merchant Marine and Fisheries Committee); S. Rep. No. 98-3, at 21 (1983) (Commerce Committee); H.R. Rep. No. 97-611, pt. 2, at 31 (1982) (Judiciary Committee).

antitrust laws, unless they have a "direct, substantial and reasonably foreseeable effect on the commerce of the United States." Section 7(a)(4) creates an exception to that exception: it exempts one type of agreement regarding transportation within and between foreign countries that does have a direct affect on United States commerce, *i.e.*, an agreement "concerning the foreign inland segment of through transportation that is part of through transportation provided in a United States import or export trade."[15]

The government viewed this relationship between the filing exception in section 5(a) and the antitrust exemptions granted by sections 7(a)(3)-(4) as crucial. Since the section 5(a) filing exception for agreements relating to transportation between foreign countries can apply only to ocean common carrier agreements,[16] and the language describing the agreements subject to antitrust immunity in section

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[15] Section 7(a)(5) is consistent with this pattern. It grants immunity for agreements to provide terminal facilities outside the United States. Marine terminals are used by ocean common carriers to provide a place for the receipt of cargo from shippers and delivery to them, and section 5(a) would exclude from filing any joint venture agreements among ocean common carriers to operate such facilities overseas. Compare sections 5(a) and 7(b)(3); H.R. Rep. No. 98-53, pt. 2, at 33 (common carrier agreements regarding terminals in the United States are subject to the antitrust laws).

[16] The only entities other than ocean common carriers whose agreements are covered under sections 4 and 5 are marine terminal operators in the United States, as defined in section 3(15), 46 U.S.C. app. 1702(15), and they do not engage in transportation within and between foreign countries.

7(a)(3) is the same, the government viewed section 7(a)(3) as limited to the same ocean common carrier agreements.

We recognize, of course, that this Court rejected the Government's interpretation of the Shipping Act in *Tucor II*. But the issue now is not whether the government's interpretation of the Shipping Act is correct–that issue was resolved by this Court against the government in *Tucor II* for purposes of this case–but rather whether a criminal prosecution based on the government's interpretation of the Shipping Act "was vexatious, frivolous, or in bad faith." Reasonable people can disagree over the plain meaning of statutory language. In this case, for example, the Court reasoned that "although section 7(a)(2) applies the antitrust immunity to any activity or agreement *within the scope of this chapter*, section 7(a)(4) clearly applies to any agreement–without limitation–concerning the foreign inland segment of through transportation." 189 F.3d at 837. Section 7(a)(2), however, applies only to agreements filed under section 5 or exempted from filing under section 16, 46 U.S.C. app. 1715, and those provisions limit section 7(a)(2) immunity to agreements of ocean common carriers and marine terminal operators.[17] To avoid redundancy, therefore, the government read the "within the scope of this chapter" phrase as

[17] Section 5(a) allows only agreements "described in section 4" to be filed, and section 16 allows the FMC to exempt only "agreements between persons subject to this Act or any specified activity of those persons." 46 U.S.C. app. 1715.

limiting the subject matter of section 7(a)(2) immunity to activities within the regulatory jurisdiction of the FMC.[18] Since sections 7(a)(3) and 7(a)(4) relate to transportation services beyond the regulatory power of the FMC, the government believed that such a subject matter limitation in them would make them self-negating, and did not draw any inferences from its absence regarding the entities whose agreements are covered.

In light of these considerations, the district court was clearly correct in finding that the government's proposed construction of the statute was not "so obviously wrong as to be frivolous" (Tucor E.R. 113).

B. The Government's Position Is Consistent With the Decisions and its Arguments in *Transpacific*

1. *The Transpacific Decision.* — The government argued in *Tucor II* that section 7 applies only to agreements of ocean common carriers and marine terminal

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[18] Congress included section 7(a)(2) because most filed agreements under the Shipping Act are agreements to agree on future terms, such particular tariff rates. In that respect, the provision has a long background in case law. See, *e.g.*, *National Ass'n of Recycling Industries v. American Mail Line*, 720 F.2d 618, 619 (9th Cir. 1983), cert. denied, 465 U.S. 1109 (1984); *Interpool Ltd. v. FMC*, 663 F.2d 142, 148 (D.C. Cir. 1980). The "reasonable basis" standard preserves carriers' antitrust immunity if they err on how far their immunity actually extends under a filed agreement. The "within the scope of the Act" phrase, on the other hand, bars any extension of the immunity beyond the FMC's regulatory power. For example, a conference could not claim immunity for fixing through rates to U.S. points via Canadian ports; even if literally covered by a filed agreement, such rates would not be "within the scope of the Act." See discussion of *Transpacific, infra*.

operators within the scope of section 4. The Court thought that argument was foreclosed by the Court's holding in *Transpacific* that section 4 jurisdiction is limited by the definition of "common carrier" in section 3(6). 951 F.2d at 954. It reasoned that because section 7(a)(3) provides antitrust immunity to agreements of carriers engaged in foreign-to-foreign transportation, which are outside the definition of a "common carrier" in section 3(6), it could not be limited to common carriers. 189 F.3d at 837.

In the district court, defendants conceded that this Court's decision in *Transpacific* did not foreclose the government's position here, but was "arguable," and they relied instead on the government's Brief in that case as contradicting the government's present position.[19] In this Court, they continue to rely primarily on that Brief, but also cite to this Court's statement in *Tucor II* that the government's argument here "makes little sense" in light of the *Transpacific* decision (Tucor Br. 23-24, citing 189 F.3d at 837). That this Court ultimately interpreted its *Transpacific* decision more broadly than the government, however, does not establish that the government's prosecution of the criminal case "was vexatious, frivolous, or in bad faith."

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[19] Docket 149, Transcript of Hearing on Feb. 25, 2000, at 13-14.

Prior to this Court's decision in *Tucor II*, the government did not view *Transpacific* as holding section 7(a)(3) inapplicable to ocean common carrier agreements, but as applying to such agreements to the extent they go beyond the FMC's subject matter jurisdiction. The reason is that *Transpacific* was a section 5 case. The issue was whether ocean common carriers could file "mixed commerce" agreements under section 5 relating to both common carrier and non-common carrier operations.[20] In that context, the FMC decided to reject mixed commerce agreements despite the fact that the proponents were ocean common carrier entities. Although the entities were entitled to file agreements under section 5(a), it reasoned that the definition of "common carrier" in section 3(6) also imposes a limitation on the subject matter of agreements allowed under section 4, *Foreign-to-Foreign Agreements*, 24 S.R.R. 1448, 1458 (FMC 1988), recon. denied, 25 S.R.R. 455

[20] Ocean common carriers routinely perform transportation services geographically more extensive than the U.S. foreign trades. The Senate Commerce Committee, for example, referred to "a liner carrier that accepts U.S.-origin cargo (or, for that matter, Canadian-origin cargo) at Halifax and calls at Boston for further loading en route to Rotterdam"–it characterized such an entity as a "common carrier" for purposes of the Act, albeit "only with respect to the Boston-Rotterdam leg of the voyage." S. Rep. No. 98-3, at 19 (1983). Similarly, the FMC in *Foreign-to-Foreign Agreements* found that agreements on various types of foreign-to-foreign arrangements, such as landbridge services, "are typically among carriers that are also Shipping Act carriers" (U.S. E.R. 56). The members of the Transpacific Westbound Rate Agreement fit that model, serving the U.S. trades both directly and by through transportation via Canadian ports.

(1989) (U.S. E.R. 46). It further read the filing exception in section 5(a) as "meant to preserve the exclusion of such agreements [outside the Act's subject matter jurisdiction] from the Act's filing requirements" (U.S. E.R. 56). In affirming that decision, this Court agreed with both FMC holdings. *Transpacific*, 951 F.2d at 953 (subject matter jurisdiction); *id.* at 955 ("section 5's new filing exclusion for foreign-to-foreign agreements provides strong evidence that Congress did not intend for the Commission to have jurisdiction over the wholly foreign portion of mixed agreements").

Section 7(a)(3) was at issue in *Transpacific* only because of the organic relationship between section 7(a)(3) and the filing exception in section 5(a). As the FMC explained in *Foreign-to-Foreign Agreements*: "Section 7(a)(3) is essentially the companion to Section 5(a)'s filing exception" (U.S. E.R. 57).

The FMC, therefore, held that the foreign-to-foreign clauses in both sections 5(a) and 7(a)(3) apply to ocean common carrier entities when they are acting outside the Shipping Act's common carrier subject matter jurisdiction. This Court affirmed that decision in *Transpacific*. The Court's decision in *Tucor II* thus significantly extended the foreign-to-foreign immunity in section 7(a)(3) in reasoning that it applies not only to ocean common carriers when they are acting outside their capacity as such, but also to non-ocean common carriers. That was not an

inevitable outgrowth of the *Transpacific* decision, and the district court properly held the cases distinguishable (Tucor E.R. 117-18). As the court said in *Gilbert*, "we will not hold that prosecutors act in bad faith when they fail to anticipate how a court will decide an issue of first impression." 198 F.3d at 1303.[21]

2. *The Government's Filings in Transpacific.* — In *Tucor II*, this Court ignored defendants' contentions that the government's argument in this case contradicted its successful argument in *Transpacific*. Nevertheless, defendants contend that the district court erred when it refused to find such a contradiction. They say that the government's legal position in this case is "a total reversal" from the government's theory in *Transpacific*, where, according to defendants, "the Justice Department effectively argued that section 7(a)(3) applies only to the conduct of entities that are *not* 'ocean common carriers,' and therefore exempts

[21] Indeed, the government had thought that *Transpacific* supported its position. Section 7(a)(4), as the government construes it, would remove from antitrust jurisdiction only the arrangements between ocean common carriers and their connecting inland carriers in foreign countries. The FMC would retain jurisdiction over agreements regarding the ocean common carriers' overall through rates and services under sections 4 and 10, 46 U.S.C. app. 1703(a)(1), 1709. The FMC has no jurisdiction over the foreign inland carriers, however, so granting them independent immunity has an effect that the Court in *Transpacific* refused to allow, "conferring antitrust immunity on parties largely [in this case, wholly] outside of the regulatory power of the Commission." 951 F.2d at 954.

conduct that falls *outside* the common carrier boundaries of the Shipping Act" (Tucor Br. 22-23) (emphasis in original).[22]

The government has never said that section 7(a)(3) does not apply to ocean common carriers, or that it applies to non-ocean common carriers. As should be clear from the context discussed above, its argument in the *Transpacific* proceedings was quite the opposite: that the foreign-to-foreign immunity, along with its section 5(a) filing exception counterpart, does apply to ocean common carriers. The only carriers involved in *Transpacific* were ocean common carriers, and the only question was the scope of the FMC's subject matter jurisdiction. Thus, as the government pointed out in its filings before the FMC, "[t]he question here is whether the Commission's *subject matter jurisdiction* reaches foreign-to-foreign agreements, regardless of the reach of *in personam* jurisdiction" (U.S. E.R. 30) (emphasis in original). Similarly, in defending the FMC's decision, the Respondents' Brief explains at length that the "common carrier" definition in the Act functions not only to identify the person subject to the Act, but also as "a gauge

[22] Defendants cite the Comments of the Department of Justice, *Proposed Rulemaking Concerning Foreign to Foreign Agreements under the Shipping Act of 1984*, at 8 (FMC Docket No. 87-24, dated Feb. 8, 1988), cited in Tucor Br. 23 n.12. For the convenience of the Court, they are reproduced at U.S. E.R. 19-35.

of subject matter jurisdiction" regulated (U.S. E.R. 93-96).[23] What the defendants are doing is misciting references to the Act's common carrier subject matter jurisdiction as if they related to entities.[24]

There is nothing in the government's pleadings, fairly read, that would suggest immunity for agreements solely among non-ocean common carriers, like defendants here.[25] The district court's finding that "it is at least arguable that the

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[23] Brief of Respondents Federal Maritime Commission and United States in *Transpacific Westbound Rate Agreement v. FMC*, 9th Cir. No. 98-70530 at 23-26 (dated April 26, 1990) (U.S. E.R. 93-96).

In Hobbs Act review proceedings, the United States and the respondent agency are separate parties, and the agency is independently represented by its own genera counsel. 28 U.S.C. 2344, 2348. See F.R.A.P. 15(a)(2)(B). The views in the *Transpacific* Brief thus reflect the views of both the United States and the FMC.

[24] Conspicuously absent from defendants' Brief here is the only passage on which they relied in the district court. It is a sentence from the FMC/USA *Transpacific* Brief (U.S. E.R. 109) in which the Respondents said that "the Commission properly concluded that [section 7(a)(3)'s] purpose was to immunize any concerted operation that fell outside the 'common carrier' boundaries described above." See Docket 132, Defs' Memorandum of Points and Authorities in Support of Jt. Motion for Attorneys' Fees and Costs 19 (filed Dec. 30, 1999); Docket 146, Jt. Reply Memorandum of Defendants 5 (filed Feb. 15, 2000); Docket 149, Transcript of Hearing on Feb. 25, 2000, at 11-13. The paragraph in which that sentence appears equates the section 7(a)(3) immunity with the section 5(a) filing exception (U.S. E.R. 108-09). Moreover, in referring to "concerted operation[s]" the government was plainly not talking about a type of entity, and the "boundaries described above" were the subject matter limitations discussed earlier in the Brief.

[25] To be sure that we are not misquoted in the other direction, we note that (continued...)

government's two positions are not in contradiction" (Tucor E.R. 118) is not only correct and sufficient, but a significant understatement.

C. Defendants' New Theory of Immunity Is Unfounded

In a further attempt to establish that the government's interpretation of the Shipping Act was unreasonable, defendants have concocted a theory of immunity that is inconsistent with this Court's opinion in *Tucor II* and wrong. In *Tucor II*, the Court held that "section 7(a)(4) is not limited to" agreements and activities of ocean common carriers and marine terminal operators. 189 F.3d at 837. Defendants now argue that instead of being "not limited to" agreements of common carriers, section 7(a)(4) does not even apply to them, because "common carriers, by definition, never could engage in the foreign inland segment of through transportation" (Tucor Br. 16).

Part of this Court's reasoning in *Tucor II* was that the foreign-to-foreign transportation immunity of section 7(a)(3) could not apply to common carriers under the Act, because the statutory definition of a "common carrier" requires

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[25] (...continued)
section 4(a) covers agreements "by" as well as "among" ocean common carriers, and the immunities in section 7 attach to "agreements," not to entities. 46 U.S.C. app. 1703(a), 1706. An agreement in which non-ocean common carriers participated with two or more ocean common carriers could be immunized, but that is not this case.

transportation between the United States and a foreign country. 189 F.3d at 837. That reasoning obviously does not apply to section 7(a)(4), which by its terms applies only to agreements regarding "transportation in a United States import or export trade." Defendants instead rely on a truncated quotation from the statutory definition of a "common carrier" to support their contention. Under section 3(6) of the Shipping Act (from which they quote only the first paragraph):

> (6) "common carrier" means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that–
>
> (A) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and
>
> (B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker. * * *

46 U.S.C. app. 1702(6). Thus, a common carrier under the Act must provide transportation by water, and under paragraph (B) it must use a port in the United States, but paragraph (A) makes it clear that it continues to act as a common carrier in assuming responsibility for a shipment beyond a port to an inland point.[26]

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[26] If section 3(6) by itself were not clear enough, the Act further defines "through transportation" to include transportation "between a United States point or port and a foreign point or port" (section 3(26)), "inland division" to mean "the (continued...)

Section 7(a)(4), therefore, plainly grants immunity to an agreement by or among a group of ocean common carriers regarding their through transportation arrangements with foreign inland carriers. Defendants' contention to the contrary is nonsense. It has no support in case law. Moreover, it has mischievous potential. A holding that Shipping Act common carriers do not act as such with respect to the inland segment of their through transportation services would frustrate a central purpose of the 1984 Act to bring their overall through transportation (as opposed to the ocean carriers' arrangements with their inland partners) under FMC jurisdiction.[27]

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[26] (...continued)
amount paid by a common carrier to an inland carrier for the inland portion of through transportation offered to the public by the common carrier" (section 3(12)), and an "inland portion" to mean "the charge to the public by a common carrier for the nonocean portion of through transportation" (section 3(13)). 46 U.S.C. app. 1702(12), (13), (26).

[27] See S. Rep. 98-3, at 10, 22 (1983); H. Rep. No. 98-53, pt. 1, at 12-13 (1983). As the Reports note, the Act requires that arrangements regarding inland carriage in the United States be made between individual ocean carriers and individual inland carriers. Sections 7(b)(1)-(2), 10(c)(4), 46 U.S.C. app. 1706(b)(1)-(2), 1709(c)(4).

IV. THE GOVERNMENT REASONABLY BELIEVED THAT THE INDICTMENT INCLUDED THE NON-THROUGH TRANSPORTATION ASPECTS OF DEFENDANTS' AGREEMENT

Defendants' contention that the district court "erred in holding that the Hyde Amendment should not apply where the government believes the victim is guilty of some offense, even though it is not the one stated on the face of the indictment" (Tucor Br. 12-13, 24-25) again misrepresents the court's actual decision. What the court found is that the government believed that the indictment on its face covered conduct that was not exempt under this Court's construction of the Shipping Act, and that its belief was relevant to the question whether the government was acting in good faith. In other words, even if the government's argument that the Shipping Act did not immunize defendants' conduct with respect to through transportation were unfounded, any inference of bad faith by the government is precluded by its belief that the indictment also covered services that were not through transportation and that were thus not immune even under defendants' interpretation of the Shipping Act.

The government's belief with respect to the scope of the indictment was plainly reasonable. The Shipping Act definition of "through transportation" requires that the shipper be charged a single-factor "through rate" by a common carrier.

Section 3(25)-(26), 46 U.S.C. app. 1702(25)-(26). The government's evidence in this case indicated that defendants' agreement applied across the board to all DoD household goods shipments, including "Code 5" shipments (Tucor E.R. 92). As shown by a declaration from Francis A. Galluzzo, a DoD official in charge of arranging the shipments,[28] many of them were under Code 5 and were not covered by a through rate, although carried under International Government Through Bills of Lading ("ITGBLs"). According to his statement (U.S. E.R. 6-7):

> 8. * * * With respect to Code 5 services, freight forwarders provided single factor rates only for the foreign and domestic surface transportation components of the movements. DOD independently contracted for the ocean carriage of Code 5 shipments. Thus, for Code 5 shipments, there existed two entirely separate rates for the movement of such shipments from origin to destination.
>
> 9. DOD utilized all seven codes of services in contracting with freight forwarders for the movement of shipments between the United States and the Philippines. Code 5, in particular, was utilized by DOD for a significant portion of such shipments.

Since DoD pays the ocean common carriers separately and directly for the port to port movement under Code 5, there is no through rate. Moreover, since the U.S. freight forwarders involved are responsible only for the inland movement at either end, they are not "common carriers" under the Shipping Act, and do not engage in

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[28] Mr. Galluzzo is Deputy Director of Personal Property, Military Traffic Management Command.

through transportation under it, with respect to such shipments. As a result, defendants' services in Code 5 shipments would not be part of through transportation or covered by a through rate. Having found that the government had acted reasonably and in good faith with respect to its interpretation of the statute, the district court had no reason to make a specific finding on the point (Tucor E.R. 120), but there is no reason to believe that Mr. Galluzzo was either lying or did not know what he was talking about. If his information was accurate, then the government's evidence showed an agreement that extended beyond the bounds of the immunity established by this Court.

The only question, then, is whether the government had reason to construe the indictment to cover that conduct. This Court found that the indictment went to the foreign inland leg of the transportation involved, an issue the government has never contested, and referred to the district court's opinion on whether all of the shipments involved "through" transportation. See *Tucor II*, 189 F.3d at 837-38, citing *Tucor I*, 35 F.Supp.2d at 1184. The district court construed the indictment to cover only through transportation because it alleged a "continuous and uninterrupted flow of United States commerce," and because of the use of ITGBLs. 35 F.Supp.2d at 1184. In effect, the district court ruled that a shipment carried under an ITGBL is, as a matter of law, a through shipment. The only prior decision known to the

government, however, indicated that the nature of a shipment under through government bills of lading is an issue of fact, not of law. See *United States v. Mississippi Valley Barge Line Co.*, 285 F.2d 381, 390-93 (8th Cir. 1960). See also *Alaska S.S. Co. v. FMC*, 399 F.2d 623, 626-27 (9th Cir. 1968) (noting factual issues in through route determination). Moreover, the Shipping Act's definition of "through transportation," such as the requirement for a through rate, makes it clear that "mere practical continuity in the transportation" is not enough to satisfy it, *United States v. Munson S.S. Line*, 283 U.S. 43, 47 (1931); *Mississippi Valley Barge Line Co.*, 285 F.2d at 392, although such "practical continuity" would be sufficient to satisfy the jurisdictional requirements of the Sherman Act to which the indictment was referring. Under the circumstances, the government reasonably believed that the indictment on its face alleged an agreement broader than the immunity under the Shipping Act as construed by this Court.

CONCLUSION

For the reasons set forth above, the decision of the district court denying attorneys' fees was correct and should be affirmed.

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CERTIFICATION PURSUANT TO CIRCUIT RULE 32(e)(4)

Pursuant to Ninth Circuit Rule 32(e)(4), I hereby certify that the attached brief uses proportionately spaced type, has a typeface of 14 points or more, and contains 10,030 words.

_____

Robert J. Wiggers

Date: July 27, 2000

CERTIFICATE OF SERVICE

I, Robert J. Wiggers, hereby certify that on this 27th day of July, 2000, I caused to be served two copies of the foregoing Brief for the United States and one copy of Excerpts of Record for the United States by first-class mail, postage prepaid, on each of the following:

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